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SESSION FIVE: THE INTERSECTION OF COMPARATIVE LAW METHODS IN PUBLIC AND PRIVATE INTERNATIONAL LAW

PROFESSOR MADIS ANDENAS

I am going to talk about the role of comparative law now and the role of law in development. That leads to the question: What law? In regard to the utility of comparative law, what is the role of law in law reform? That sounds absolutely pathetic, “the role of law in law reform,” but if you look at law reform projects, it is a very valid question. What is the way to attach law, in a formal sense, to legal concepts? Is it something we just do to give effect to a policy? Is it anything more than that? And we do not very actively use legal concepts. It is just giving form to a policy. This creates serious problems.

We start by looking at a couple of more foundational concepts. You spoke about the rule and you talked about the variations. Even so, you have in many of the variations different meanings. It was very much within the common law and perhaps within the United States traditional rule of law. The Court of Justice, by the way, has a number of judgments where it deals with the rule of law, and these are judgments from the 1990s. They come up with the judgments in all of the languages of the European Union. In judgments where they use the rule of law, they do not use just one translation. They give three or four translations. If the judgment is in another language, they add this fourth translation as a sense of comfort. And that is the way of acknowledging that we put very different meanings into the concept of rule of law. I think that is an important basis. We have to recognize that even the most basic concepts we are dealing with provide the basis for forms of law reform. We will find that we put different meanings into law reform. Very often what we do is discuss these terms as if they had the same meaning, which, of course, they do not.

Let us look at a couple of more specific concepts. We can illustrate this point, if we go into more technical legal concepts. Look at concepts such as independence. What do we mean by independence? Even when I talk about independence of the judiciary, we can find so many features of the judicial system that, in one legal system, would be considered absolutely essential to protect the independence of the bulwark of independence, which is not present in another system. If we are looking at independence of legal bodies, we can look at financial market regulations. You are looking at independence of central banks, independence of national

market regulators. Again, you will put different meanings into this in different jurisdictions.

Now, you can move on and look at the concept of prudential regulation. We can talk about prudential regulation in European Union law. It is an area where there can be no national regulation. It is an area which is reserved for community law organization. It is where member states are left room to regulate—they have been left with regulatory freedom. In the U.S. domestic concept, the context is also used. Prudential is used to limit or expand, actually to define hetero jurisdiction in banking law. You can look at this concept as a lender of last resort. These are technical concepts with very different functions and very different meanings, depending not only on what context it appears in but on which jurisdiction it appears in. When we are dealing with these legal concepts, we have this problem—we have this idea that law and legal concepts are there, that they are the basis of law reform. On the other hand, we use our national concepts, or, even if we are at the international level, we use the concepts the way they are used, we believe, in our international jurisdiction, and we assume that is universally applicable, which, of course, it is not. Now, here you have a very important issue for comparative law.

All of this creates a very rich and fertile ground for comparative law. But comparative law has not been able to pick up on this as an academic discipline. Comparative law is in some kind of crisis right now. If ever comparative law had a language as an academic discipline it does not have it right now. Too much time is spent on discussing one's identity, what comparative law is for, the method, and what the most fundamental issues are. Now courts are, of course, important forum for comparative law and they are the easiest starting point. Everybody who follows what happens in the U.S. Supreme Court will enjoy the discussion about the use of foreign law or international law in *Roper v. Simmons*. It is the important recent decision, in which Kennedy, for the majority, makes use of comparative law and international law sources. Justice O'Connor's opinion could be seen as the most sophisticated opinion on the use of comparative law. Even in this case, where she is not going with the majority, she builds up a kind of intellectual basis for refusing looking at comparative law. *Fairchild* is an English case which is interesting because the opinion applies the text in that case. This is an English House of Lords decision about profession, a private law topic. It is a technical private law topic with some public policy consequences, but it is nothing like *Roper v. Simmons*. The same test for the use of comparative law is applied in that case, as Kennedy uses for the majority in *Roper v. Simmons*. Remember that if you are the only country in the world with a particular law, you have to undertake some real scrutiny of the rule you have in international legal systems. If you are executing 16 to 18 year-olds and nobody else in the world executes 16 to 18 year-olds, then perhaps you have to look seriously and anxiously into whether this can be seen to comply with basic principles. There is a very intense discussion about the

way courts use comparative law and there is no unanimous decision on that.

Now, law reform in comparative law is a different matter, particularly if you are looking at legislation. We know that comparative law has many active uses. It provides alternatives to choose from, and you can check your compliance with international standards. It helps to avoid the danger in the international world of remaining bilateral. In most international law contexts, we have our own jurisdiction. We are looking at our compliance, our relationship with the international jurisdiction. Whatever level they are at, there is this bilateral traffic between the one jurisdiction and the international law or international practice. Comparative law allows you, then, to look at compliance in other countries, which is of great assistance when you are going to implement international standards. Another important function is, of course, that it provides empirical material as to consequences and effectiveness of different features of a rule. All of this is highly problematic, but perhaps this providing of alternatives to choose from is the most important practical use of comparative law in the law reform context. However, there are many problems there, as we will see in a little while. The question that still remains is, do they work? Systemic and cultural conflicts, cultural values, cultural differences are used as the major arguments against it.

That leads into another perspective, which is open and closed systems. If you are looking at this in national law, comparative law is not a venture, because we have a closed legal system. We have authority. Therefore it is not relevant, and does not provide us with any help if we make use of it the way Kennedy does, as the majority does. We are actually recognizing foreign law as a source, which it should not be. Kennedy and the majority say it is not a source, but they still look at it. That is dishonest. You know, a typical Scalia way of approaching it. It looks very sharp and intellectual but when you reduce it, you may doubt it.

Why do you close a legal system? It is interesting to look at. Looking at Roman law, it has a relationship to common law, and it is starting to look at the law as it is applied in the different local courts in the cities, particularly the cities of northern Italy. And it is a very logical exercise. You do not have to go very far before you see the need to close. If you go up a couple of hundred years, and you look at Louis the Fourteenth of France, he provides the basis for an absolutist monarchy and for much more, sovereignty—very much national sovereignty. Louis establishes a national monarchy which is not subject to any authority from the Hapsburgs. The idea is that legal sources outside a national system do not have much weight. If you move on into the 19th century and, it continues into the 20th century, it is very much a question of establishing a national legal order which at some stage probably requires the closing of the legal system—not recognizing sources outside the national system. It is a kind of Scalia approach.

It is not only a question of national legal systems that have to close. Within the law, you find similar processes develop in most parts. The way it was taught in European universities in the late 19th century, it is very close to the emerging sociological tradition. When you start developing, you have professors who were professors of law of state and economics of state. Then, sociology started in the law faculties. And when you want to establish public law, you take over private law matters to some extent and you want to close down the relationship to the social sciences as they are emerging. And that happened. So you have to close down law to the influence from these different social sciences. Then, often you had to establish a method. You had to close down the relationship and revert back to private law.

It is interesting to look at these kinds of processes. If you look at Tolstoy's *War and Peace* you see that he establishes general principles of international law. He borrows extensively from the digests—the Roman digests. He borrows from Roman law. He cannot recognize it because that would somehow make the illegitimacy of his project apparent. It is slightly difficult. So, he borrows, but he never acknowledges it. Actually, there is a discussion where he hoped to deny his borrowing in any way. So this kind of traffic happens, but when the system closes down, you do not want to acknowledge you are borrowing for different reasons. It does not mean that it does not continue. It is just that you do not acknowledge it.

That leads us to the reasoning for opening it. In the period we are in now, we have national systems that recognize the influence of international law, and which have much more open law reform processes than ever before, particularly in countries which are undergoing more fundamental reform. We recognize that we are borrowing, but the problem is we do not really have much of a method for it. The interdisciplinary context is very interesting. It is problematic for comparative law because what is happening is that the law in context—the inclusion of social science perspectives and empirical method beyond the normative—might apply in this large prudential approach.

Articles

